

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BERTHEA V. D.,

v. Plaintiff,
5:18-CV-979(TWD)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OLINSKY LAW GROUP
For Plaintiff
250 South Clinton Street, Suite 210
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OF COUNSEL:

HOWARD D. OLINSKY, ESQ.
EDWARD A. WICKLUND, ESQ.

LUCY WEILBRENNER, ESQ.
Special Assistant

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER

Presently before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. §405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on January 16, 2020, during a telephone conference at which a court reporter was

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

present. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found the Commissioner's determination resulted from the application of proper legal principles and was supported by substantial evidence, and I provided further detail regarding my reasoning and addressing the specific issues raised by the Plaintiff in her appeal.

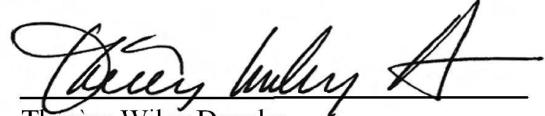
After due deliberation, and based upon the Court's oral bench decision, which has been transcribed, is attached to this Order and is incorporated in its entirety by reference herein, it is hereby,

ORDERED, as follows:

- (1) Defendant's motion for judgment on the pleadings is **GRANTED**;
- (2) The Commissioner's determination that Plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is **AFFIRMED**; and
- (3) The Clerk is directed to enter judgment, based upon this determination, dismissing Plaintiff's complaint in its entirety.

SO ORDERED.

Dated: January 22, 2020
Syracuse, New York



Therese Wiley Dancks
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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BERTHEA VICTORIA D.,

Plaintiff,

vs.

5:18-CV-979

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

-----x
Transcript of a **Decision** held during a
Telephone Conference on January 16, 2020, at the
James Hanley Federal Building, 100 South Clinton
Street, Syracuse, New York, the HONORABLE THÉRÈSE
WILEY DANCKS, United States Magistrate Judge,
Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: OLINSKY LAW OFFICE
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(In Chambers, Counsel present by telephone.)

2 THE COURT: So to begin, I have before me a request
3 for judicial review of an adverse determination by the Acting
4 Commissioner under 42 United States Code Section 405(g).

The background is as follows: Plaintiff was born in 1962 and is currently 57 years old. She was 48 years old at the alleged onset date of disability of September 14, 2010. She has a high school education and is a certified nurse assistant. She last engaged in substantial gainful activity on December 18, 2013, thus she must be found to be under a disability since that date to be eligible for benefits.

13 Her past jobs have included home health aide and
14 hotel housekeeper. In her application for benefits, she
15 indicated she suffers from human immunodeficiency virus, or
16 HIV, degenerative disk disease, lupus, and anxiety.

17 Procedurally, for purposes of this matter, the
18 plaintiff filed for Title XVI benefits on December 18, 2013.
19 As noted, she alleged an onset date of disability beginning
20 September 14, 2010. An earlier hearing was held on
21 August 24, 2015 which resulted in an unfavorable decision and
22 the Appeals Council denied review. An appeal to the District
23 Court ensued and the case was ultimately remanded.
24 Thereafter, a further hearing was conducted by Administrative
25 Law Judge Jeremy Eldred on March 5, 2018, wherein the

1 plaintiff testified, as did a vocational expert. ALJ Eldred
2 issued a decision on June 14, 2018, finding that plaintiff
3 was not disabled at the relevant times. This became the
4 final determination of the Social Security Administration
5 since plaintiff bypassed written exceptions and the Appeals
6 Council did not assume jurisdiction. This timely District
7 Court action followed.

8 In this case, ALJ Eldred applied the requisite
9 five-step sequential test for determining disability.

10 At step one, he found plaintiff had not engaged in
11 substantial gainful activity since December 18, 2013, as
12 noted above.

13 At step two, he concluded plaintiff suffers from
14 the severe conditions of degenerative disk disease of the
15 cervical and lumbar spines, degenerative joint disease of the
16 shoulders, HIV, discoid lupus erythematosus, herpes zoster
17 ophthalmicus, residual complications of a total abdominal
18 hysterectomy, and a history of polysubstance abuse.

19 At step three, the ALJ concluded that plaintiff's
20 conditions do not meet or medically equal any of the listed
21 presumptively disabling conditions. Then after review of the
22 record evidence, the ALJ determined plaintiff is capable of
23 performing medium work with additional limitations.

24 At step four, the ALJ concluded the plaintiff had
25 no past relevant work, and at step five the ALJ applied the

1 the Medical-Vocational Guidelines, or the Grids, finding that
2 her nonexertional limitations did not have a significant
3 impact on the occupational base across all exertional levels,
4 including the medium occupational base, and he concluded
5 therefore that plaintiff was not disabled.

6 As relevant to the time period in question,
7 plaintiff treated with Syracuse Community Health Center,
8 mainly with Dr. Howard and Dr. Awayda. She continued
9 treatment with Dr. Howard when he moved to a different
10 practice. The plaintiff was also treated at Upstate
11 University Hospital, including in their emergency, surgical
12 specialties, physical therapy, and vision care departments.
13 She was also treated at St. Joseph's Hospital, Crouse
14 Hospital and its chemical dependency treatment services, and
15 Correctional Care Solutions. She also sought treatment
16 through the Onondaga County Department of Social Services for
17 mental health and substance abuse issues. She had a
18 consultative medical exam with Dr. Ganesh in February 2014,
19 and a consultative psychiatric exam with Dr. Fisher that same
20 day.

21 At the request of ALJ Eldred, a record review was
22 conducted by Dr. Chandrasekhar whose April of 2018 report was
23 proffered to plaintiff's counsel for review and comment but
24 no response was received.

25 I've reviewed the record carefully and in light of

1 the arguments of counsel and what counsel have presented in
2 their briefs, I've applied the requisite deferential standard
3 which requires me to determine whether proper legal
4 principles were applied and whether the result is supported
5 by substantial evidence.

6 I'll turn first to the ALJ's determination of
7 plaintiff's residual functional capacity, or RFC. Plaintiff
8 argues that the ALJ improperly analyzed the opinion evidence.
9 Specifically, plaintiff argues the ALJ failed to weigh or
10 provide a proper analysis regarding the opinions of treating
11 physicians Drs. Howard and Awayda. Plaintiff also argues the
12 ALJ failed to follow the treating physician rule.

13 I have done a thorough and searching review of the
14 record and find that the ALJ properly assessed the medical
15 and nonmedical evidence and the RFC is supported by
16 substantial evidence. The ALJ discussed the medical evidence
17 and other evidence of record, formulated the RFC based upon
18 an assessment of all medical and nonmedical evidence as a
19 whole for the relevant time period, and explained his
20 analysis in arriving at the RFC. The ALJ also followed the
21 terms of the District Court's remand. The ALJ's decision
22 shows he considered treatment records for the relevant time
23 period as well as the opinions of record.

24 He noted the records regarding her HIV status show
25 it is under control, and plaintiff confirmed that in her

1 testimony.

2 Regarding the lupus condition that causes skin
3 issues, plaintiff testified she gets relief from a cream she
4 uses, and the records show the condition was regularly
5 treated without any reference to it causing disabling
6 symptoms.

7 Vision treatment records show she has adequate
8 vision despite the herpes zoster erythematosus that affects
9 her eyes.

10 Plaintiff testified and the record evidence shows
11 her substance abuse is in remission.

12 As to her musculoskeletal issues, the ALJ discussed
13 treatment records and findings. He noted the findings on
14 exam in Dr. Ganesh's report showed minimal physical findings,
15 including a normal gait, normal and full strength in all
16 extremities, full range of motion in the cervical spine, and
17 no sensory deficits.

18 Likewise, most of the records of Drs. Howard and
19 Awayda often did not show any pertinent findings on exam of
20 plaintiff's shoulders, back, and neck. Dr. Howard noted at
21 most treatment encounters in 2014 through 2018 that plaintiff
22 walked with a normal gait, had no cervical or lumbar
23 lordosis, and had full range of motion. Her neck was supple
24 and she denied muscle weakness. In 2013 she had good range
25 of motion in her neck and both upper extremities. Many

1 records of Drs. Howard and Awayda throughout the period at
2 issue did not even mention anything about her musculoskeletal
3 symptoms other than to note it in a problem list. Dr. Awayda
4 noted her spine to be without deformities or tenderness in
5 2013. In 2014 Dr. Howard found good range of motion in her
6 upper and lower extremities. Dr. Awayda found mild
7 tenderness in her cervical spine in early 2014 and noted the
8 findings of the 2014 MRIs of her neck and low back. Still,
9 he found she had good motor power in upper and lower
10 extremities, despite the findings on the MRIs. In
11 April 2014, Dr. Awayda found she was getting good improvement
12 with physical therapy. Dr. Howard noted in May of 2014 that
13 she had good range of motion in her neck and no obvious
14 deformities. Dr. Howard found her to have a normal gait and
15 normal extremities in August of 2014. While she complained
16 of chronic back and neck pain, Dr. Awayda found her to be
17 sitting comfortably with no swelling in her extremities.
18 When she presented for spinal pain in 2015 with complaints of
19 radiating pain to her arms and legs, Dr. Howard found her to
20 have good range of motion in both upper and lower extremities
21 and Dr. Awayda found her extremities normal to inspection.
22 In 2017, Dr. Howard found her heel-and-toe walk testing was
23 normal and she was able to get up on her tiptoes. When
24 positive findings were noted in February and March of 2017,
25 there was only some tenderness in the low back with some

1 limited flexion and her gait was slow. By May of 2017,
2 normal findings were again reported, and she had full range
3 of motion in her low back and neck. Upstate Hospital's
4 records often note a normal range of motion in plaintiff's
5 neck and normal musculoskeletal exams. The physical therapy
6 discharge note in 2014 indicated she was no longer in need of
7 restorative treatment.

8 MRIs in 2010 and 2014 showed degenerative changes
9 in her low back without nerve root compression. MRIs of her
10 neck in 2010 and 2014 show disk herniations and stenosis with
11 some flattening of the cord at C3-4 through C5-6 but
12 vertebral bodies and disk heights were normal.

13 Although she had a diagnosis of degenerative disk
14 disease in her neck, medical treatment notes did not show
15 weakness in her upper extremities or decreased grip strength.
16 Conservative treatment of physical therapy and pain
17 medications were recommended and prescribed. And as I noted
18 earlier, the physical therapy discharge note indicated she
19 was no longer in need of restorative treatment.

20 Based upon the treatment during the relevant time
21 period, the ALJ found plaintiff capable of medium work with
22 some restrictions to account for her musculoskeletal
23 impairments.

24 I find all of the treatment outlined above was
25 reviewed by the ALJ and the records provide clear and

1 substantial evidence to support the RFC determination such
2 that meaningful judicial review is possible. Here, I find
3 the ALJ's analysis regarding plaintiff's functional
4 limitations and restrictions affords an adequate basis for
5 meaningful judicial review, applies the proper standards, and
6 is supported by substantial evidence such that additional
7 analysis would be unnecessary or superfluous.

8 Turning specifically to plaintiff's arguments that
9 the so-called treating physician rule was not properly
10 applied by the ALJ, I find that argument unconvincing. In
11 *Estrella v. Berryhill*, 925 F.3d 90, the court noted that an
12 ALJ's failure to explicitly apply the factors listed in 20
13 C.F.R. Section 404.1527(c)(2) is procedural error, but the
14 court will affirm if a searching review of the record shows
15 that the substance of the treating physician rule was not
16 traversed. I have done that searching review and find that
17 the substance of the treating physician rule was followed.

18 With regard to the ALJ giving no specific weight to
19 Dr. Ganesh's opinion and the employability assessments done
20 by Drs. Howard and Awayda, I find that argument unpersuasive
21 as well, since the ALJ noted he gave greater weight to
22 Dr. Chandrasekhar's opinion than those opinions, thus clearly
23 giving the opinions of Drs. Ganesh, Howard, and Awayda less
24 weight. I find the ALJ properly assessed those opinions, and
25 he gave good reasons for not crediting the limitations

1 suggested by Drs. Howard and Awayda. The ALJ correctly noted
2 that the assessments of those physicians were for the
3 Department of Social Services which is a different
4 governmental agency that does not apply the same disability
5 analysis as the SSA. The ALJ also credited
6 Dr. Chandrasekhar's opinion with greater weight than the
7 other opinions because of his programmatic expertise and
8 because he reviewed all of the evidence of record through the
9 date of his April 2018 report. Additionally, the opinion of
10 Dr. Howard that appears to be for Jobs Plus as part of the
11 Social Services review dated March 21, 2013 is outside the
12 relevant time period, and it indicates that any disability is
13 not expected to last more than one year. I will also note
14 that Dr. Chandrasekhar's opinion set forth specific
15 functional limitations, whereas the other opinions did not.

16 Further, the ALJ also pointed to plaintiff's
17 activity level to support his RFC determination. The record
18 shows she cooks daily, does housework and laundry with some
19 help, shops for food and clothing and can take public
20 transportation.

21 The ALJ also noted plaintiff generally had
22 conservative treatment for her back and neck and noted the
23 objective findings on examination, as I've summarized above,
24 regarding her conditions do not support a finding of
25 disability. The opinions of Drs. Awayda and Howard on

1 plaintiff's limitations were inconsistent with treatment
2 notes and the overall medical record during the relevant time
3 period, as outlined above, showing only minimal findings and
4 conservative treatment for plaintiff's claimed disabling
5 conditions.

6 Thus, I find that the ALJ properly evaluated the
7 opinion evidence and gave good reasons for giving greater
8 weight to the opinion of Dr. Chandrasekhar than the other
9 opinions in the record. Accordingly, remand is not required
10 on this basis.

11 All in all, I find the ALJ properly weighed the
12 opinions of record for the relevant period and considered all
13 of the medical evidence showing plaintiff's conservative
14 limited treatment through physical therapy and various
15 medications for all of her conditions, including pain
16 medication. All of this supports the ALJ's determination of
17 plaintiff's RFC.

18 In light of the foregoing and considering the
19 entire record and the ALJ's determination, I find that the
20 ALJ applied the appropriate legal standards of review in
21 determining plaintiff's RFC and the RFC is supported by
22 substantial evidence.

23 I've considered plaintiff's brief step five
24 argument and I find it to be without merit. Since I've found
25 that the RFC is supported by substantial evidence and correct

1 legal standards were applied, I find that the ALJ's step five
2 determination is proper.

3 So I grant defendant's motion for judgment on the
4 pleadings and will enter a judgment dismissing plaintiff's
5 complaint in this action. A copy of the transcript of my
6 decision will be attached to the order should any appeal be
7 taken from my determination.

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CERTIFICATE OF OFFICIAL REPORTER

4 I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
5 Official Realtime Court Reporter, in and for the
6 United States District Court for the Northern
7 District of New York, DO HEREBY CERTIFY that
8 pursuant to Section 753, Title 28, United States
9 Code, that the foregoing is a true and correct
10 transcript of the stenographically reported
11 proceedings held in the above-entitled matter and
12 that the transcript page format is in conformance
13 with the regulations of the Judicial Conference of
14 the United States.

Dated this 17th day of January, 2020.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter